

*United States Court of Appeals
for the Second Circuit*

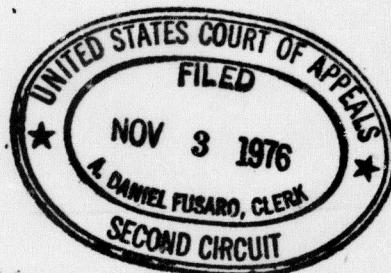


AMICUS BRIEF

766109

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
HUNTINGTON TOWERS, LTD. and :
RICHARD CAREY, :
Plaintiffs-Appellants, :
-against- :
FRANKLIN NATIONAL BANK (in liquidation), :
FEDERAL DEPOSIT INSURANCE CORPORATION, :
FEDERAL RESERVE BANK OF NEW YORK, :
EUROPEAN AMERICAN BANK and JAMES SMITH, :
individually and as Comptroller of the :
Currency, :
Defendants-Respondents. :
----- X



BRIEF

MEMORANDUM OF SOL NEIL CORBIN, TRUSTEE IN BANKRUPTCY
OF FRANKLIN NEW YORK CORPORATION, AS AMICUS CURIAE

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Sol Neil Corbin, as Trustee in Bankruptcy (the "Trustee") of Franklin New York Corporation ("FNYC"), the holding company of Franklin National Bank ("FNB"), submits this brief as amicus curiae.

The interest of the amicus arises out of the following circumstances. In the opinion below, Judge Judd dismissed plaintiffs' second claim against European-American Bank and Trust Company ("EAB") with the observation that with "respect to plaintiff's second claim, EAB is entitled to the protection

accorded a bona fide purchaser." Opin. at 30.* A similar defense that EAB is a bona fide purchaser has also been raised in actions filed by the Trustee and by Manufacturers Hanover Trust Co. ("MHT Co.") against EAB and other defendants.

(Corbin v. FDIC et al., 75 C 2144, and Manufacturers Hanover Trust Co. v. Franklin New York Corporation, et al., 76 C 1102.

In these actions, which have been consolidated, the Trustee and MHT Co. seek to recover \$30,000,000 which MHT Co. loaned to FNYC in April 1974, shortly before the massive fraud in the bank's foreign exchange and investment departments came to light in early May. These funds were immediately transferred to FNB to augment its capital and, it appears, subsequently were transferred to EAB in the purchase and assumption transaction of October 8, 1974. Copies of the Trustee's amended complaint and of EAB's amended answer are annexed as exhibits to the moving affidavit.

This brief is submitted to suggest to the Court that

- (1) it need not reach the question of EAB's status as a bona fide purchaser in order to resolve the issues on this appeal,
- (2) the issues surrounding EAB's status as a bona fide purchaser are complex and were not explored in the papers filed with the

* References are to the typescript copy of the opinion below.

district court, and, in any event, (3) EAB's status as a bona fide purchaser with respect to the \$30,000,000 presents distinct and important issues so that the Court should confine any decision in the instant case to the facts and claims here at issue.

I.

THE COURT SHOULD NOT REACH THE QUESTION OF EAB'S STATUS AS A BONA FIDE PURCHASER ON THIS APPEAL

Plaintiffs second claim alleges that the purchase and assumption transaction was contrary to law and a fraud on general creditors of FNB because as a result of the transaction there will be little or no assets available for general creditors. Complaint ¶21. The Federal Reserve Bank ("FRB") and the Federal Deposit Insurance Corporation ("FDIC") were clearly the principal defendants with respect to this claim since plaintiffs sought no specific relief as to EAB, but rather sought a declaration that defendant FRB was entitled to no security interest or preference in payment with respect to the assets of FNB held by FDIC in its corporate capacity. Judge Judd dismissed this claim against FDIC in its corporate capacity holding that the claim was premature:

"... parties whose claim is unliquidated, and whose status as creditors is disputed, should not be permitted to challenge the general validity of FDIC's lien, or its selection of liabilities which should be assumed by EAB, in the same case where they seek to establish their status as creditors. Even if plaintiffs establish a right to damages it may be fully offset by the amount of advances made by Franklin." Opin. at 21.

Since the attack on FDIC's lien in the second claim was dismissed as premature as to FDIC in its corporate capacity, it should also have been dismissed on that basis with respect to EAB, without reaching the issue of EAB's status as a bona fide purchaser. FDIC in its corporate capacity and EAB were identically situated as transferees of FNB assets, and if plaintiffs' second claim was premature as to one, it should be equally premature as to the other. A parallel determination of the claims against FDIC and EAB would have been particularly appropriate since FDIC's indemnity to EAB with respect to plaintiffs' claims means that FDIC in its corporate capacity will bear the entire burden of any recovery against either FDIC or EAB.

II.

EAB'S STATUS AS A BONA FIDE PURCHASER RAISES SUBSTANTIAL QUESTIONS NOT CONSIDERED BELOW

The question of EAB's status as a bona fide purchaser drew only passing attention in voluminous briefs principally

directed to other issues. No consideration was given to the following:

(1) The defense of bona fide purchaser status is an equitable defense. Since EAB was completely indemnified by FDIC with respect to plaintiffs' claims, its equities should be irrelevant since it would suffer no loss if the claim were allowed. The equities of the indemnitor -- FDIC in its corporate capacity -- might be relevant, but Judge Judd did not hold that FDIC in its corporate capacity was a bona fide purchaser of FNB assets. On the contrary, he expressly allowed plaintiffs' claim for restitution of specific property as against FDIC in its corporate capacity. Opin. at 22.* This appears correct, since it is difficult to see how a party as deeply involved in a transaction as FDIC could claim the equities of a bona fide purchaser with respect to the validity of the transaction. In any event, the dismissal of the claim against EAB by reason of FDIC's indemnity (Opin. at 31) seems clearly erroneous, since the fact that a party will be indemnified does not mean that the action should proceed solely against the indemnitor.

* These were mortgages which Judge Judd assumed were transferred to FDIC in its corporate capacity because they were not assets selected by EAB. Opin. at 10.

(2) Even if EAB's equities were relevant, and the purchase and assumption transaction were invalid so that a claim might lie against EAB as a participant, the parties wholly failed to consider the question whether EAB had used "due diligence" to determine the validity of the transaction so as to create immunity from claims. This eminently factual question was simply ignored because the entire issue of EAB's status was peripheral to the more basic issues in the case. If the Court determines that the issue of the validity of the purchase and assumption transaction was not prematurely raised with respect to FDIC in its corporate capacity, and reverses as to FDIC, it should also reverse with respect to EAB so that a proper record can be made on the issue of its liability.

III.

ANY DETERMINATION OF EAB'S STATUS SHOULD BE CONFINED TO THE PARTICULAR FACTS AND CLAIMS IN THE INSTANT CASE

In their claims against EAB, the Trustee and MHT Co. seek to trace and recover the \$30,000,000 loaned to FNYC and apparently received by EAB in the purchase and assumption transaction. As previously stated, in the instant case, Judge Judd expressly upheld the pleading of such a restitutionary claim against FDIC in its corporate capacity as transferee.

Whether EAB is a bona fide purchaser of assets as to which the receiver lacked good title presents questions of law and -- if those questions are resolved adversely to the Trustee and MHT Co. -- questions of fact relating to due diligence and constructive notice of FDIC and EAB. These issues are currently in discovery. If the Court believes it necessary to reach the question of the bona fide purchaser status of EAB in this litigation, we respectfully suggest that it confine its opinion narrowly to the particular question whether EAB should be deemed a bona fide purchaser with respect to a claim that the entire sale of assets was unlawful. Whether EAB could be a bona fide purchaser with respect to restitutionary claims relating to particular assets is an issue not presented by the instant litigation since the mortgages in question apparently were not transferred to EAB.

Respectfully submitted,

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